UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. 20 Cr. 281 (KPF)

SOULEYMANE BALDE,

Decision

Defendant.

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New York, N.Y.
May 17, 2021
11:30 a.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

AUDREY STRAUSS
United States Attorney for the
Southern District of New York
MARY CHRISTINE SLAVIK
KIERSTEN FLETCHER
Assistant United States Attorney

JENNIFER WILLIS
Attorney for Defendant

(The Court and all parties present remotely)

THE DEPUTY CLERK: Your Honor, this is in the matter of USA v. Balde.

Counsel, please state your names for the record, beginning with the government.

MS. SLAVIK: Good morning, your Honor. Christine Slavik for the United States. I'm joined on the line by my colleague AUSA Kiersten Fletcher.

THE COURT: Good morning. And thank you to both of you.

Representing Mr. Balde?

MS. WILLIS: Good morning, your Honor. Jennifer Willis on behalf of Mr. Balde.

THE COURT: Thank you very much.

And is Mr. Balde on the line as well?

MS. WILLIS: He is, your Honor.

THE DEFENDANT: Yes. Good morning to the Court.

THE COURT: Of course, sir. Good morning. And thank you very much.

Ms. Willis, as this is an oral decision in this matter, it is a proceeding to which your client has the right to be present. He also has the right to waive this ability and to have the matter take place by telephone. After speaking with him about this matter, do you understand that it's his wish to proceed by telephone?

MS. WILLIS: Yes, your Honor.

THE COURT: Thank you. May I confirm that please, with Mr. Balde.

MS. WILLIS: Yes, your Honor.

THE DEFENDANT: Yes.

THE COURT: Mr. Balde, do I understand that you are comfortable proceeding by telephone today, rather than an in-person proceeding?

THE DEFENDANT: Yes, your Honor.

THE COURT: Thank you, sir. And so we will proceed by telephone. I want to thank you all for agreeing to participate by phone.

I also want to thank you all for your patience. This may have seemed like an easy matter to each side, but it was not to me. And each time I thought I was ready to decide it, I found some other rabbit hole to go down, so I appreciate the patience that you extended to me in letting me take the time I needed to think through these very, very important issues. It is very much a compliment to the excellent oral and written presentations that I received from both sides that it took me this long to decide it. I also do want to pause for a moment and to extend my condolences to Mr. Balde and his family for their recent loss. Again, they have our condolences, mine and my chambers'.

I will now begin, and I will read into the record the

oral decision in this matter. For me, it is a bit lengthy. And yet, it is easier for me to read this than to make it into a written decision. So if that means that folks will be putting the phone on mute and just sort of going about their business while they are listening to this, I certainly understand. But we are here today for a decision on Mr. Balde's motion to dismiss the indictment, an indictment that was filed on June 3rd of 2020. And that indictment was returned by a grand jury sitting in White Plains, New York and drawn from a jury wheel consisting of residents of Westchester, Putnam, Rockland, Orange, Sullivan, and Dutchess Counties. Mr. Balde -- whose alleged offense, unlawful possession of a firearm by an alien, occurred in Bronx County -- moves for dismissal on the basis of the government's use of a White Plains grand jury to obtain an indictment in a case that is to be tried in Manhattan by petit jurors drawn from New York, Bronx, Westchester, Putnam, and Rockland Counties violated his rights under the Fifth and Sixth Amendment to the United States Constitution and the Jury Selection and Service Act, which I will refer to at times as the JSSA, contained at §1861 to 1878 of Title 18 of the United States Code. And for the reasons that I'm about to outline, I am denying this motion.

I'm going to give just a very brief summary of the prior proceedings in this matter, the proceedings that bring us to this point. As I know the parties know, this is the second

case involving the same allegations against Mr. Balde. The first indictment was filed on February 17th of 2016. Mr. Balde pleaded guilty pursuant to a conditional guilty plea on June 6th, 2017. Judgment was imposed on October 12th of 2017. Mr. Balde was sentenced principally to a term of 23 months' imprisonment.

Mr. Balde, as contemplated by the conditional guilty plea appealed the denial of his pretrial motion to dismiss. And that appeal was initially decided in the government's favor by the Second Circuit. But the opinion was withdrawn and superseded on rehearing. Following the Supreme Court's decision in the *Rehaif v. United States*, 139 S. Ct. 2191, and that's shown at 943 F.3d 73. And in that decision, the Second Circuit vacated Mr. Balde's conviction and remanded it to this court for further proceedings.

On remand, Mr. Balde filed a motion to dismiss the indictment, which I granted without prejudice on May 21st of 2020. And that same day, the government filed the criminal complaint that yielded ultimately this matter alleging the same underlying conduct. An indictment was obtained on June 3rd of 2020 from the Southern District of New York by a grand jury sitting in White Plains. That grand jury was the only one available at that time, due in part to a November 30th, 2020 order from then-chief judge Colleen McMahon temporarily suspending the additional impanelment of grand juries. The

case was designated for Manhattan in accordance with Rule 6 of the local rules for the division of business among district judges, I will call those occasionally the business division rules, and it was reassigned to this court on June 8th of 2020. On June 9th, Mr. Balde filed a motion for access to records concerning the creation of the master and qualified jury wheels for this district as relevant to the composition of the grand jury that returned the indictment against him.

On June 30th of 2020, the Court held a telephonic conference with the present parties, as well as the jury administrator for the Southern District of New York, the counsel to the clerk of court for the Southern District of New York, and counsel in several other cases in which similar motions were made. Following that conference, there was a schedule for the defendant to file a request for records. A protective order was issued and entered on August 4th of 2020. In August and September of 2020, the Court continued to work with the parties, the jury administrator, and other personnel to identify and obtain relevant records requested by Mr. Balde. On October 14th of 2020, the Court set a schedule for briefing and oral arguments on Mr. Balde's motion to dismiss the indictment. The motion was filed in November and opposed and replied in December. The Court heard oral argument on January 7th of 2021. And I'll now begin.

Mr. Balde's motion to dismiss the indictment raises

three interrelated arguments. First, he argues that the government's decision to obtain the indictment from the White Plains grand jury, which grand jury was constituted from a population that is not demographically representative of the community in which Mr. Balde committed the alleged offense and in which a trial would occur violated his right under the Sixth Amendment to a grand jury drawn from a fair cross-section of the community. Second, Mr. Balde argues that the government's conduct violated his Fifth Amendment right to equal protection of the laws by discriminating against minorities as potential grand jurors. Third, and finally, he argues that the use of the White Plains grand jury for a Manhattan case violated his rights under the JSSA because it constituted a substantial failure to comply with the JSSA's requirement that a grand jury be randomly selected from a fair cross-section of the community. The government responds that there was nothing improper by their use of the White Plains grand jury to obtain the indictment against the defendant and that each of these three claims should be denied. As I'm about to explain, the Court concludes that the defendant has not established a violation of his rights under the Fifth or Sixth Amendment or a substantial failure to comply with the JSSA.

In arriving at this decision, I have looked at some recent cases that have come in from other judges in this district. They're not dispositive and they don't take the

place of my analysis, but I know the parties are aware of them, and I'll just mention them by name and docket number: *United States v. Allen*, 20 Cr. 366; *United States v. Schulte*, 17 Cr. 548; *United States v. Tagliaferro*, 19 Cr. 472; *United States v. Chandler*, 19 Cr. 867; and *United States v. Jarrett*, 19 Cr. 670. These cases, however, have varying degrees of factual and procedural similarity to this case. So while we all might arrive at the same or nearly the same results, we do come to it from different ways.

I'm now turning to the division of business and the jury composition in the Southern District of New York. And by statute, United States district courts in New York State are divided among four districts; Northern, Southern, Eastern, and Western. And that's contained in 28 U.S.C. §112. The Southern District of New York comprises, Bronx, Dutchess, New York, Orange, Putnam, Rockland, Sullivan, and Westchester Counties. The courthouses are located in Manhattan and White Plains. The district is not further subdivided into divisions by statute, but rather the division of business between the Manhattan and White Plains courthouses is the result of the district's internal business division rules. As relevant here, Rule 6(a) of those rules provides that indictments designated from Manhattan may be returned by the grand jury in open court to the magistrate judge presiding in the criminal part. Indictments designated for White Plains may be returned by the

grand jury to the magistrate judge presiding in the White Plains courthouse. A criminal matter will be designated to White Plains by the United States attorney if the crime was allegedly committed in whole or predominant part in the northern counties. And that's business division Rule 18(b). The rules go no further in addressing grand jury operations nor the division of criminal business. And they also do not designate the grand jury from which the government must seek an indictment in any particular case. As stated somewhat differently, the district's own rules neither expressly prohibit nor expressly permit the government's actions in this case.

The district's jury plan, which was last modified in 2009, sets forth a multistep process for the identification, qualification, and selection of jurors. The district maintains two master jury wheels; one for the Manhattan courthouse, which includes residents of the counties of New York, Bronx, Westchester, Putnam, and Rockland, and the other for White Plains, which includes residents of the counties of Westchester, Putnam, Rockland, Orange, Sullivan, and Dutchess. Members of the master jury wheels are selected randomly from voter registration lists and in proportionate share from each county. Because Westchester, Putnam, and Rockland Counties are represented in both master jury wheels, residents of those counties are proportionately split between the jury wheels so

as to reasonably reflect the relative number of registered voters in each county within the respective master jury wheels. The master jury wheels are regenerated every four years, no later than September 1st in the year following each presidential election.

To build the qualified jury wheels, the clerk of court determines approximately how many jurors will be needed to meet the Court's demands for the next six months plus a margin of extra names. This number of persons is then randomly drawn from each master jury wheel, and those potential jurors are sent a questionnaire regarding their qualifications and availability for jury service. The questionnaires come with instructions that they are to be completed and returned within ten days. The returned questionnaires are evaluated for completeness and eligibility. And all persons to be determined to be eligible constitute the qualified jury wheels.

Approximately once a month, the clerk of court determines the anticipated juror needs for the ensuing month and sends summonses to the necessary number of persons chosen at random from the qualified jury wheels. Those summoned are then randomly assigned to grand and petit jury panels as needed. The jury plan also sets forth categories of individuals who are automatically exempt from jury service, excusable on request or disqualified, as well as the criteria judges should use to determine other individuals who may be

excused for other reasons.

As set forth in Mr. Balde's expert's report, which is uncontested in relevant part by the government, the jury eligible population for the entire Southern District of New York in 2018 was 18.09 percent black or African-American and 23.41 percent Hispanic or Latino. In the counties feeding the Manhattan master jury wheel, the jury eligible population in 2018 was 20.92 percent black or African-American and 28.06 percent Hispanic or Latino. In the counties feeding the White Plains master jury wheel, the jury eligible population in 2018 was 12.45 percent black or African-American and 14.12 percent Hispanic or Latino.

Now, to begin with Mr. Balde's claims, we begin with his claims that his right under the Sixth Amendment and the JSSA to a jury drawn from a fair cross-section of the community was violated when the government obtained the indictment from the White Plains grand jury, even though the alleged offense occurred in the Bronx and the trial was to be held in Manhattan. And this is because Mr. Balde argues that the demographics of the White Plains jury pool are substantially different from the demographics of both the Manhattan jury pool and the district as a whole. Specifically, the White Plains jury pool has smaller black or African-American and Hispanic or Latino populations than both the Manhattan jury pool and the district as a whole. Looking at the applicable law, the text

of the Sixth Amendment provides that a defendant is entitled to trial by an impartial jury of the state and district wherein the crimes shall have been committed. This right has been interpreted to require trial by a jury selected from a fair and representative cross-section of the community. One case for this proposition, I cite *Taylor v. Louisiana,* 419 U.S. 522, a Supreme Court decision from 1975. A few years later in *Duren v. Missouri,* the Supreme Court articulated a three-part test that defendants must meet in order to establish a prima facie violation of the fair cross-section requirement. Number one, the excluded group must be distinctive. Number two, representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community. And third, the underrepresentation must be due to systematic exclusion of the group in the jury selection process. The *Duren* case is reported at 439 U.S. 357 from 1979.

The JSSA sets forth the policy that all litigants in federal court entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes. I'm quoting here from 28 U.S.C. §1861. The Second Circuit has held in this regard that fair cross-section challenges brought under the JSSA must also be analyzed using the *Duren* test. And this is stated principally

in the case of *United States v. LaChance*, 788 F.2d 856 (2d Cir. 1986). As a result, if a fair cross-section challenge fails under the Sixth Amendment, it also fails under the JSSA. Although it's not clear that the converse is necessarily the case, I admitted the possibility that there may be a JSSA case that would survive even where the Sixth Amendment fair cross-section claim failed. If the defendant makes a prima facie showing under *Duren,* the state may rebut it by showing a significant state interest behind the selection process at issue.

Now, as to the first *Duren* prong, whether the excluded groups -- blacks or African-Americans or Hispanics or Latinos -- are distinctive, there is no dispute between the parties that they are. And for this reason, I'll move to the second prong, which is whether these groups are fairly and reasonably in venires in rough proportion to their numbers in the relevant community.

And so beginning first with the question of community, let me begin this section by reiterating what happened here. The government sought the operative indictment in June 2020. And due to the COVID-19 pandemic, the district had only one operating grand jury sitting in White Plains. There was no grand jury sitting in Manhattan, and it was unknown when grand jury operations in Manhattan would resume. And as a result, the government obtained the indictment from the White Plains

grand jury, even though Mr. Balde's conduct is alleged to have occurred in the Bronx and the government intended to try the case in Manhattan. The parties first disagreement on this point is which community is the relevant one for purposes of the Sixth Amendment and the JSSA fair cross-section analysis. Just for some thoughts on that, the issues involve whether community is defined more narrowly than district, if the district does not have statutory subdivisions. And if that is the case, is the relevant community the community where the alleged crime occurred or the trial will be held or a given jury, either grand or petit sits? An issue is whether these communities, must they all be the same or can the relevant communities be different at the grand jury stage than it is at trial? And how do varying demographics affect the answers to these questions?

The defendant argues that, in general, the government must obtain an indictment and go to trial in the same community, and that community should be where the alleged offense occurred. Mr. Balde argues that because the district has chosen to divide its business into a White Plains division and a Manhattan division, as the term division is defined in the JSSA, in §1869(e), and because the district maintains a separate master and qualified jury wheel for each, the government is largely bound to adhere to those divisions when it indicts and tries cases. That said, the defense does admit

that if an indictment is obtained in one location and trial is to occur in a different location, there can still be Sixth Amendment compliance, if the demographics of the two locations are sufficiently similar and no distinctive group is substantially underrepresented in one as compared to the other. In this case specifically, that means that because Mr. Balde's alleged criminal conduct occurred in the Bronx, Bronx County provides potential jurors to the Manhattan division and the White Plains jury pool is demographically distinct from both the Manhattan jury pool and the district as a whole, in order to comply with the fair cross-section requirement, the government was obligated to obtain the indictment from a Manhattan division grand jury.

The government counters that Mr. Balde is entitled only to a jury drawn from somewhere in the district and not to a jury drawn from the entire district or from the counties surrounding where the offense was committed. The government also notes that the relevant community for the grand jury may be different than the relevant community for trial, with the fair cross-section requirement being analyzed separately for each. In the government's estimation, the question for Sixth Amendment purposes is whether the jury pool from which the White Plains grand jury that indicted Mr. Balde was drawn was fairly representative of the population of the counties contributing to that jury pool. To the government it is

irrelevant, and Mr. Balde is slated to be tried in Manhattan and a trial will have a petit jury drawn from a community with different racial demographics.

This court has thoroughly considered the parties' arguments and drawn what it can from the precedent. But the cases identified by the parties and the other cases that the Court has reviewed in its own research are generally quite fact specific and distinguishable. These issues are complicated and there is no clear answer for the Court to merely adopt. With all of that said, the Court concludes that the weight of the case law supports the government's position that the relevant community for defendant's challenge to his indictment is the population of the counties feeding the White Plains jury pool from which his grand jury was drawn. Beginning first with the Second Circuit's decision in *United States v. Bahna*, which was then certiorari denied *Soares v. United States*, I know that the parties are very familiar with these cases because we discussed them so deeply in oral argument. And I'll therefore just briefly summarize some salient facts.

That case arose in the Eastern District of New York. The offense at issue occurred in Brooklyn. The first trial was held at the Brooklyn courthouse. But after a new trial was granted, defendant Soares was retried in Uniondale and convicted a second time. The Uniondale jury was selected from different populations. Mr. Soares alleged that there was an

underrepresentation of blacks and Hispanics in the Long Island division as opposed to the Eastern District as a whole. And he therefore requested a panel drawn either from the entire district or from Kings, Queens, and Richmond Counties. The Second Circuit found, "As a general rule, selections are to be made from the area surrounding the courthouse where the case is to be tried. Under the district rules, jurors are selected from the division in which the court sits." The Court also found that they were not prepared to say that the judicial council in the Eastern District of New York erred in its approval and that it is well settled that neither the jury selection statute nor the Constitution requires that jurors be drawn from an entire district. Therefore, the Court found that where a jury venire is drawn from a properly designated division, we look to that division to see whether there has been any unlawful or unconstitutional treatment of minorities. To be clear, the jury at issue in *Bahna* was the petit jury. But the Court did appear to include grand juries when it said that, as a general rule, jury selections are made from the areas surrounding the courthouse where the case is to be tried. I do not interpret this to mean -- as I think Mr. Balde would prefer -- that grand juries must be selected from the area around where the trial will ultimately occur.

In this case, Soares does not appear to have objected to the case being indicted in one location and tried in

another. That is, of course, a claim that Mr. Balde does make. But the Second Circuit found no issue with the grand jury that indicted Mr. Soares and the petit jury that tried him being drawn from different populations. And that suggests for this case that the relevant population for determining the representativeness of the White Plains grand jury is the population feeding the White Plains jury pool and not the district as a whole or the division where the offense occurred.

Another case that we discussed in great depth was *United States v. Plaza-Andrades*. And that case arose in the Northern District of New York, which at the time randomly distributed criminal cases between the nonstatutory divisions of the district, regardless of where the alleged offense occurred. Mr. Plaza-Andrades' offense occurred in Syracuse. He was arraigned and had two pretrial hearings in Syracuse. But the case was assigned to the district court in Utica for trial. And thereafter, Mr. Plaza-Andrades brought a 2255 motion arguing ineffectiveness because his counsel had failed to challenge holding his trial in the Utica division. The Second Circuit found that the Northern District's random assignment of criminal cases to different divisions based on a neutral case assignment plan does not on its face constitute a systematic exclusion of any group from jury service. I'm quoting here from the Second Circuit's decision, 507 F. Appendix, the opening page is 22, but this was at Page 26.

The Second Circuit further found, as precedent makes clear, that the Sixth Amendment does not entitle a defendant to be tried in a geographic location any more specific than the district where the offense was allegedly committed. In this regard, the circuit relied on the Sixth Amendment, but also on a prior decision of its own, *United States v, Fernandez*, 480 F.2d 726(1973). While this case seems to be helpful to the government and was cited by the government as such, it would appear to be distinguishable both because of the mechanism by which the issue was raised and the fact that the assignment was the result of a random process in which the prosecution played no part. The *Fernandez* decision, which is cited by *Plaza-Andrades*, discussed a concern that too great leeway in the selection of situs for trial leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution. And understandably, Mr. Balde is suggesting that that concern is present here, given the demographic disparities between Manhattan and White Plains.

There is as well a Southern District decision from 1998, *United States v. Johnson*, reported at 21 F.Supp.2d 329, and in that case the division of the district into White Plains and Manhattan divisions, arguing generally that the jury pool in the White Plains division did not adequately represent the black and Hispanic populations in the community. The Court

found, however, that the defendants had failed to satisfy the second prong of the test, that they had not presented evidence that the White Plains master wheel does not represent a fair and reasonable cross-section of the community. And instead, the Court found that the arguments were based on the erroneous assumption that the only proper community for the White Plains courthouse is the entire Southern District. In the *Johnson* case, the Court also noted *Duren's* admonition or suggestion that while community was not clearly defined, it was generally accepted that the term referred to the district or division where the trial is to be held. Finally, the Court found that so long as the division was not gerrymandered, it will withstand constitutional scrutiny, even if the division differs from the district as a whole in terms of its racial or socioeconomic composition. There the Court was quoting from *United States v. Cannady,* a Ninth Circuit decision from 1995, which in turn was also quoting a Tenth Circuit decision, *United States v. Test.* And because the White Plains division was found to be merely drawn along county lines rationally related -- one moment, please.

I'm understanding Mr. Balde has dropped off the call. We'll pause at this time until I'm advised that he's back on. Mr. Balde, have you rejoined the call?

MS. WILLIS: Your Honor, I am back on the line now, and I do have Mr. Balde with me on a merged call.

THE COURT: Thank you very much. I will go back to this.

Ultimately, in *Johnson* -- and excuse me if I am repeating myself -- the Court found that because the White Plains division was merely drawn along county lines, rationally related to the two courthouses and was not gerrymandered, the overlap did not impinge on the defendant's Sixth Amendment rights. Now, in this case, Mr. Balde has pulled out and cited to me the quote that "community generally refers to the district or division where trial is to be held," and intuits from that that because the trial was to be held in Manhattan, the relevant community for purposes of grand jury selection was also Manhattan. However, the question that was presented and answered by *Johnson* is whether it was permissible for the district to maintain two separate jury wheels pulling from different populations. It found that it was. It did not answer the question whether the grand jury and the petit jury must be drawn from the same pool and specifically the pool of the division where trial will be held or where the offense was committed.

The parties have asked me to look at two other cases, which I have. *United States v. Richardson*, 537 F.3d 951, an Eighth Circuit decision from 2008. And among other things, the Court found there that the defendant, Richardson, did not have a right to have his trial in or jurors summoned from a

particular division of the state and district where the crime was committed. And then in *Franklin v. United States*, a Fifth Circuit decision from 1967, reported at 384 F.2d 377, the Court found no constitutional guarantee that the accused had the right to a trial in the division of the district in which the offense was committed.

So in sum, what the Court derives from the cases I have just been discussing is the following: First, Mr. Balde has the right under the Sixth Amendment and the JSSA to be indicted by a grand jury and tried by a petit jury pulled from populations within the Southern District of New York. He is not entitled to be both indicted and tried by juries pulled from a subdivision of the state, even though the district has exercised its discretion to split business between the two courthouses. Second, while it is the case in this district that the grand jury and petit jury are generally drawn from the same division within the district, this is not always true and it is not constitutionally required. And third, the relevant population for determining jury pool representativeness is the community in which each jury sits. There is no constitutional problem with Mr. Balde being indicted in White Plains -- again, only because of COVID-related restrictions -- and tried in Manhattan. And whether the jury pool from which his grand jury was drawn represented a fair cross-section of the community must be determined with reference to the population of the

county feeding the White Plains jury pool, not with reference to the district as a whole or to the Manhattan division. Having concluded that the proper reference point is the population of the counties constituting the White Plains division, we now turn to the demographic makeup of the White Plains master and qualified jury wheels as compared to the overall demographic makeup of the counties from which they are drawn. And in this regard, the parties first dispute which jury pool should be used to analyze Mr. Balde's fair cross-section challenge. Defendant contends that the White Plains qualified jury wheel is the relevant jury venire, whereas the government argues for the White Plains master wheel. There is no clear answer from the Supreme Court or the Second Circuit regarding what constitutes the appropriate jury venire to consider in this context. In *United States v. Rioux*, for example, the Federal Circuit observed that the relevant jury pool may be defined by the master list, the qualified wheel, the venires or a combination of the three, that's at 97 F.3d 648 a Second Circuit decision from 1996. And several district courts within this circuit have defined the relevant jury pool with reference to the systematic defect identified by the defendant, and so that would include both the lower court's decision in *Rioux* from the District Court of Connecticut reported at 930 F.Supp. 1558 if and the *Allen* decision that was discussed earlier, which defined the jury pool as both the

White Plains master wheel and the White Plains qualified wheel, because the allegations impacted both venires. The bulk of Mr. Balde's claims concern the construction of the master wheel. But in any case, and just to be clear, the Court finds that the claims fail as to both wheels.

The parties also dispute the appropriate method of statistical comparison. Three options were provided; the absolute disparity method, the comparative disparity method, and the statistical decision theory. Mr. Balde contends that the data showed significant underrepresentation regardless of which method is used. The Second Circuit has strongly suggested that the absolute disparity method is generally appropriate -- and that's in the *Rioux* decision that I mentioned earlier -- and that is therefore the method that this court will use.

The absolute disparity method measures the difference between the group's representation in the relevant community and the representation in the jury venire. And so, for example, if African-Americans composed 10 percent of the community but only 5 percent of the jury venire, the absolute disparity would be 5 percent. Under Second Circuit precedent, absolute disparity nearly as high as 5 percent has not been found to satisfy the underrepresentation element in *Duren*. As support for this, I cite to the parties *United States v. Biaggi*, 909 F.2d 662, a Second Circuit decision from 1990, and

the *Allen* decision and an earlier decision, the *Barnes* decision, 520 F.Supp.2d 510, a Southern District decision from 2007. Here, the parties do not dispute that African-Americans make up 11.2 percent and Hispanic-Americans make up 12.97 percent of the White Plains master wheel. In the relevant community, African-Americans make up 12.45 percent and Hispanic-Americans 14.12 percent of the jury eligible population. The absolute disparities are therefore 1.25 percent for African-Americans and 1.15 for Hispanic-Americans, and those figures fall comfortably within the tolerated disparities in past precedents, leaving the Court to conclude that Mr. Balde has not met the second element under *Duren*. But even if the White Plains qualified wheel were to be used as the relevant jury venire, the absolute disparities would be 3.69 percent and 3.64 percent, which are still comfortably within the permissible range.

Mr. Balde's fair cross-section challenge fails on a separate basis, though. It fails because he has not demonstrated the third element, systematic exclusion, which requires a showing that the underrepresentation is due to a systematic exclusion of the group in the jury selection process. And I'm quoting here from the *Duren* decision, 439 U.S. at 364.

In *Rioux,* the Second Circuit explained that there is systematic exclusion when the underrepresentation is due to the

system of jury selection itself, rather than external forces. I'm quoting here at 97 F.3d at 658. Under the external forces principle, by contrast, outside causes of underrepresentation, such as demographic changes do not constitute systematic exclusion. Now, that is in the *Rioux* case, and it's also in *Schanbarger v. Macy*, 77 F.3d 1424, a Second Circuit decision from 1996. For other circuits, *United States v. Little Bear*, 583 F.2d 211, a Second Circuit decision from 1978; *United States v. Jones*, 2006 WL 278248 (E.D. La. Feb 3, 2006). And in thinking about the external forces principle and comparing it to Mr. Balde's arguments in this case, I find that those arguments are largely foreclosed by the principle.

So to begin, Mr. Balde first contends that the government systematically excluded black or African-American and Hispanic or Latino jurors by seeking the indictment in White Plains, in lieu of the more racially diverse Manhattan community. But as previously mentioned, the reason the government proceeded this way was because of an external force, the COVID-19 pandemic and its substantial curtailment of in-person proceedings throughout the district. This was not prosecutorial gamesmanship or forum shopping, as Mr. Balde suggests. And the circumstances do not establish systematic exclusion. Second, he argues that the jury plan's replenishment of the master wheels only once every four years constitutes systematic exclusion. And this is so, according to

Mr. Balde, is because the four-year period causes addresses to become stale as people move to new addresses. And because African-Americans and Hispanic Americans are on average younger and more likely to move, he argues that these groups are systematically excluded. But even accepting the supposition that these groups move more often, the Court remains unpersuaded that this constitutes systematic exclusion within the meaning of the Sixth Amendment because moving rates are an external force and not a defect inherent in the jury plan. Third, Mr. Balde asserts that the jury plan's exclusive reliance on voter registration lists constitutes systematic exclusion. But this claim is foreclosed by the Second Circuit's decision in *Schanbarger*, which held that a jury venire drawn from voter registration lists violates neither the Sixth Amendment's fair cross-section requirement nor the Fifth Amendment's guarantee of equal protection. Fourth, Mr. Balde alleges that the exclusion of inactive voters in certain counties within the White Plains division constitutes systematic exclusion because African-Americans and Hispanic-Americans are more likely to be inactive voters. But again, the alleged exclusion here is the result of forces external to the jury plan, including, for example, people moving. And finally, Mr. Balde notes that jurors drawn from the overlapping counties were inequitably prorated between the two courthouses, but he has not shown that this alleged error

caused the underrepresentation at issue. And in fact other decisions -- the *Schulte* and *Allen* decisions that I mentioned -- found the same error to have a minimal effect on venires. And perhaps underlying all of this is the fact that the Court is accepting expert witness statements that the dominant cause of the differences here include the fact that African-Americans and Hispanic-Americans are less likely to return juror questionnaires, more likely to be found not qualified, and more likely to be excused. Again, things that are external to the jury plan. And so as a result, I find that Mr. Balde has not established the second and third elements under *Duren*. And his fair cross-section challenge under the Sixth Amendment must be rejected. And to the extent it's being raised under the JSSA, it is also being rejected.

At our oral argument, defense counsel did not argue Mr. Balde's Fifth Amendment claim, but rather characterized that decision as a choice to not press the argument rather than to drop the argument, and therefore, I will address it in the interest of completeness. In this regard, the equal protection clause of the Fifth Amendment forbids as well the exclusion of racial minorities from grand and petit juries, *Castaneda v. Partida*, a Supreme Court decision from 1977 at 430 U.S. 482, makes this point. To raise a plausible equal protection challenge against a jury selection system, a defendant must show a recognizable group singled out for different treatment,

substantial underrepresentation over a significant period of time, and that the selection procedure is susceptible to abuse or not racially neutral. Now, although this three-part test resembles to some degree the Fifth Amendment framework, the equal protection claims must additionally allege intentional discrimination by the jury selection system at issue, and that is made clear in the *Rioux* decision I mentioned earlier.

So here, Mr. Balde must furnish proof of discriminatory intent. It's also stated in the *United States v. Biaggi* decision I mentioned earlier. Now, although clear statistical evidence may raise a presumption of intentional discrimination in some cases, that presumption may be rebutted by the government. Here, Mr. Balde alleges that the racial disparities in the jury pool are caused by clerical errors used in processing alternate addresses, removal of inactive voters, the decision to update the master jury wheel every four years, and the allegedly improper proration of voters across overlapping counties. But all of these issues are facially race-neutral, and their impact on the racial composition of the wheels is neither inevitable nor substantially demonstrated. Mr. Balde has further not shown how the jury plan might itself potentially be susceptible to abuse. For these reasons, the Court is not persuaded that it can reasonably infer that the jury plan is intentionally discriminatory, and Mr. Balde's equal protection claim is denied.

That leaves me with Mr. Balde's JSSA claim. And I'm analyzing it at this point in the proceeding as something different or slightly different from the fair cross-section claim because, in addition to fair cross-section claims, the defendant may also assert other violations of the JSSA if those violations constitute a substantial failure to comply with its own provisions. And that's from the *LaChance* decision and also the *Allen* decision that makes the point. Mere technical violations of the JSSA are not actionable, again, from *LaChance.* And whether a violation is substantial or merely technical depends upon the nature and extent of its affect on the wheels and the venire from which a defendant's grand jury was derived. I'm quoting here from *LaChance.* Determining substantial compliance requires weighing the violation against the goals of the act. Now, with respect to the defendant, Mr. Balde's, JSSA arguments, here he focuses frequently on absolute numbers, while the government focuses on percentages. And while discussing earlier the fair cross-section cases, the Court's research shows largely coextensive analyses in that the differences, the disparities that are proffered are frequently viewed through the lens of the magnitude of underrepresentation.

Now, earlier in this opinion, I noted one policy of the JSSA was to ensure that all litigants in federal courts shall have the right to grand and petit juries selected at

random from a fair cross-section of the community. But there is as well a second policy that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States. In the Court's estimation, the first policy objective is presumably why other courts have focused on underrepresentation. Here, the defendant's interest is in a fair cross-section. None of the issues that Mr. Balde raised has appeared to substantially interfered with achievement of that fair cross-section. Some of the choices in the jury plan do implicate the second policy objective, but there are practical reasons for them. Here, Mr. Balde's claims overlap nearly completely with the Sixth Amendment fair cross-section claims, and I'm going to be denying it for largely the same reasons. Mr. Balde contends that the following defects constitute substantial violations of the JSSA: They include the government's decision to seek the indictment from White Plains and not Manhattan; the exclusion of inactive voters from certain counties located in the White Plains division; the allegedly erroneous proration of jurors from the counties that overlap both courthouses; and the clerical error by which voters who have registered with an alternate mailing address were excluded from jury selection. For the reasons I'm about to state, the Court concludes that these allegations do not amount to substantial violations of the JSSA.

First, the government's decision to seek the indictment in White Plains was appropriate under the circumstances and did not improperly exclude certain populations in the grand jury pool and thus did not contravene the JSSA. Second, this court, like others in this district, concludes that the exclusion of inactive voters from certain counties represented in the White Plains jury pool does not substantially violate the JSSA, because it is entirely logical for a jury selection process to exclude individuals who have since moved. Third, with respect to proration, Mr. Balde has not shown that this had a more than minimal affect on the demographic composition of the jury pool, and the decision to prorate overlapping counties in the White Plains jury pool ensured proportional representation of the counties in the district overall. Finally, exclusion of the voters with alternate mailing addresses in fact increased the representation of black or African-American and Hispanic or Latino populations in the jury pool. But even then, on this latter point, the Court accepts the expert witness analysis that that would have yielded an additional 1,681 people.

Ultimately, the methods that were selected in the jury plan did not affect the random nature or the objectivity of the selection process, and they did not constitute either individually or collectively a substantial failure to comply. In short, this Court is not persuaded that the issues that

Mr. Balde has identified rise to the level of substantial violations of the JSSA. They are, at worst, technical violations. And as such, the Court will not dismiss the indictment on JSSA grounds.

For all of these reasons, Mr. Balde's motion to dismiss the indictment is denied. But I do want to thank the parties, and not merely for remaining on this line so that I could give you the decision, but because I think it was appropriate that these issues be raised so that they can receive the attention of the judges in the Southern District whose job it is or whose duties include that of ensuring that the district's jury plan produces the most equitable and representative jury pools possible, this is especially the case as this is the year where we will be constructing new master and qualified jury wheels. So I again thank you for your patience.

And I think the question for the parties is that of next steps. Ms. Slavik, are you still on the line?

MS. SLAVIK: I am, your Honor, yes.

THE COURT: Thank you. Ms. Slavik, I believe the next step would be that of setting a trial date, but I do not know if there is additional discovery between the first and second iterations of the indictment that needs to be produced to Mr. Balde or whether the parties have other things to propose to my attention.

MS. SLAVIK: Your Honor, discovery is complete in this case. The government is not aware of any additional discovery that requires production. So from the government's perspective, the next step is to set a trial date.

THE COURT: Ms. Willis, let me please turn to you. Ms. Willis, from your perspective, do you believe that you have all of the discovery to which your client is entitled, and do you agree that the next step is one of setting a trial date?

MS. WILLIS: Your Honor, first, yes, I do believe I have all of the discovery that we are entitled to. I do think that setting a trial date is likely the next step.

What I would ask your Honor is, instead of picking one right this moment, I have already identified a second chair for potential trial, that individual is not available for the call today. I just want to be able to consult with them briefly to make sure I am not missing something else that we should be doing. I don't think I am. I think that the trial date is what's coming, but I would just like to be able to check in with that person briefly, your Honor. And perhaps we could confer with the government. And I honestly don't know what the Court's schedule is, in terms of approximately when the Court would be available for trial, but I would just like a brief opportunity to consult with my second chair.

THE COURT: Of course. Let me just give you a couple of thoughts. I think that is actually the most sensible thing

to do.

It is my understanding that May 15 or thereabouts was the day to submit requests for the third quarter of 2021. And so therefore, I would not be able to set a trial for the third quarter. My fourth quarter is actually quite busy, but I can certainly see whether there are spots available. I might have better luck in the first quarter of 2022, which sounds horrible to say that, but I'm sure the parties are in the same boat that I'm in. We're just limited in the amount of trials that we can have. I think I would ask the parties for their thoughts about the fourth quarter of this year and the first quarter of the next.

Ms. Willis, something else that I know you know, but I just want to say it, if your client preferred to do this as a bench trial, where I think the principle issue would be the knowledge element that's come to us as a result of *Rehaif*, I might have different availability and I might be able to use a system different than our court's central scheduling system. It is of course your client's right to have trial by jury. But just given the uniqueness of this case, you may also want to have a bench trial. I just want to offer that to you as an option. Of course, both sides would have to agree to it. Ms. Willis, do you think I could have something from you in two weeks or so?

MS. WILLIS: Absolutely, your Honor. And I will

definitely discuss his rights with respect to bench trial and jury trial with Mr. Balde as well prior to whatever date your Honor selects to hear back from the parties.

THE COURT: Let me set that date, please, as June 2nd. And I'm setting that specifically because there's the intervening Memorial Day weekend, and that might complicate some things, in terms of getting everyone's schedules together. So I'll take that as the control date for this case. And then once I hear from you, we'll try to figure out what our schedule is as well.

Ms. Slavik, does that work for you, the 2nd of June?

MS. SLAVIK: Yes, your Honor. The 2nd of June is fine for the government to propose a joint letter to the Court as to trial dates.

THE COURT: Thank you. And may I ask your office as well -- although it may not be necessary -- to consider the possibility of a bench trial?

MS. SLAVIK: Of course, your Honor.

THE COURT: Thank you.

Ms. Slavik, is there an application from the government?

MS. SLAVIK: Yes, your Honor. The government moves to exclude time under the Speedy Trail Act between now and June 2nd, the date on which the joint letter is due to the Court, to permit the parties to consult about trial dates as

well as to discuss potential pretrial resolution.

THE COURT: Thank you very much.

Ms. Willis, your position, please.

MS. WILLIS: Your Honor, no objection to the exclusion of time.

THE COURT: Thank you so much. Then let me advise Mr. Balde that, for reasons I know we have talked about in the past, I will be excluding time from today's date through the 2nd of June finding that the interests of justice served by excluding this period of time outweigh the interests of the public and of Mr. Balde in particular in getting to trial more quickly. Everyone was kind enough to allow me the time I needed to resolve these motions. And I want to allow you the time that you need to figure out next steps in response to them and to talk about the possibility of a bench trail or a jury trial and when such a trial might take place. And sadly, because of the ongoing pandemic, our trial scheduling system is still one that is centralized and limits, to a degree, my ability to have this trial as quickly as I would like to, and so time is excluded through the 2nd of June.

Is there anything else that the government wishes to discuss with me today?

MS. SLAVIK: No, your Honor.

THE COURT: Ms. Slavik, may I understand that you will be getting a copy of this transcript?

MS. SLAVIK: Yes, your Honor.

THE COURT: Thank you.

Ms. Willis, is there anything that you and your client wish to discuss with me today?

MS. WILLIS: No, your Honor, not at this time. Thank you.

THE COURT: I thank you all very much. I wish you continued safety and good health in this pandemic. We are adjourned. Thank you.

(Adjourned)